

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM HALE HOARD III,

Defendant and Appellant.

F056309

(Super. Ct. No. BF123477A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Victor Haltom, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Wiseman, Acting P.J., Cornell, J., and Dawson, J.

A jury convicted appellant William Hale Hoard III of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c); count 1), a felony, and resisting, delaying or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1), count 2), a misdemeanor. The jury also found true enhancement allegations that appellant personally used a deadly or dangerous weapon in committing the count 1 offense (Pen. Code, § 12022, subd. (b)(1)) and that he had served a prison term for a prior felony conviction (Pen. Code, § 667.5, subd. (b)). The court imposed a prison term of five years, consisting of the three-year midterm on count 1 plus one year on each of the two enhancements. On count 2, the court imposed a concurrent 90-day term in county jail.

On appeal, appellant's sole contention is that the prosecutor engaged in prejudicial misconduct in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), by commenting on appellant's failure to testify at trial. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts - Prosecution Case

At approximately 10:05 a.m. on May 26, 2008 (May 26), a Black man, wearing dark clothing, a beanie and a mask, and holding a knife in his hand, entered Martin's Market Liquor Store (liquor store) as Jung Chi, the owner of the store, was standing in front of the counter. The man demanded money. Chi handed the man some money. She then opened a cash register and the man took some more money and ran out of the store. After waiting a few minutes, Chi telephoned her husband and then the police. The man made off with approximately \$1,200.

On May 26 at approximately 10:00 a.m., as John Washington was driving near the liquor store, he saw a man run out of the store. Washington pulled up in front of the store and the man, as he ran by, kicked Washington's car. The man ran toward, and then into,

an alley, and Washington followed him in his car. As the man ran, he started taking off articles of clothing.

The man “turned the corner,” and Washington lost sight of him. Approximately 15 seconds later, Washington saw a Black man emerge from the back yard of a nearby residence, climb over a fence and run toward Washington, who was sitting in his parked car. There was nothing covering the man’s face. He was Black, and his “clothing ... was the same” as the man Washington had seen seconds before. As the man approached Washington, he pulled out a knife. As the man ran by Washington’s car he kicked it and continued running. Washington followed, and the man jumped over a cement fence. At that point, Washington drove back in the direction of the liquor store.

While driving, Washington saw the same man, running near a building that was formerly a K-Mart store. When Washington got back to the liquor store, he made contact with a police officer who had arrived on the scene. Less than a minute later, with Washington driving his car and the officer following in his, Washington led the officer to the old K-Mart store.

At 10:38 a.m. on May 26, City of Bakersfield Police Officer Nathan McCauley and his partner, responding to a report they received from police dispatch, were in the vicinity of the liquor store when they saw a Black male, who met the “suspect description” the officers had received; the man was wearing black clothing and he was walking in the area of some dumpsters.

Officer McCauley got out of his car and approached the man, whom the officer later identified as appellant. The officer did not see anything in the man’s hands and could not tell if he was collecting cans. As the officer approached he said, “let me talk to you for a second, sir.” Appellant said, “hold on a second.” The officer responded that he needed to talk to appellant, but appellant began to walk away. The officer, who

continued to approach appellant, yelled for him to stop, but appellant ran off and jumped over a wall.

The officer ran to the spot where appellant went over the wall, but appellant was not visible. At that point, Officer McCauley put out a radio call to other police officers, informing them of what he had seen.

On May 26, sometime after 10:00 a.m., City of Bakersfield Police Officer Tyler Kinney responded to the scene and “started looking for a suspect.” He encountered appellant in the yard of an apartment complex; appellant appeared to be in the process of removing his shirt. Appellant was wearing a black beanie cap and he had a pair of gloves in his pocket. Officer Kinney took appellant into custody.

Police took Washington to an in-field “show up” at a location approximately two or three blocks away from the liquor store. The police had a man in custody. Washington recognized him as the man he had seen running out of the liquor store earlier.

Police transported Chi to the location where appellant had been arrested, approximately three blocks from the liquor store. There, police had appellant in custody; he was standing in the alley. Chi testified the man was the same height and weight as the man who robbed her, and was wearing pants similar to those worn by the robber. Chi had not been able to see the robber’s face and was not able to positively identify appellant as the man who robbed her.

Facts - Defense Case

Bonnie Bowden, a friend of appellant’s, testified to the following: She was with appellant from 9:00 a.m. to 10:30 a.m. on May 26, in an alley near an old K-Mart store, looking for cans for recycling. At one point, appellant was looking for cans in some dumpsters when two police officers approached on foot and spoke to appellant.

Appellant, at that point, walked over to a brick wall, jumped over it and ran. The officers gave chase.

On July 25, 2008, a defense investigator showed Washington a photographic line-up consisting of six photographs. Appellant's photograph was in the "number five position." The investigator asked Washington if any of the photographs depicted "the person or persons who committed the crime." Washington stated, "I think it is No. 2"

Police officers searched appellant's person, the area where officers first observed appellant and the area where appellant was seen running, but found no currency, bandana, scarf, mask or knife.

Procedural and Additional Factual Background

Appellant did not testify at trial.

A police officer testified on cross-examination that after appellant was taken into custody, "it [was] determined that Mr. Hoard had a bench warrant for his arrest[.]" The witness confirmed "that's something if you don't show up for court or you don't comply with some rule of court they issue a warrant for your arrest that goes into the system," and that "data base ... can be accessed by police officers."

In closing argument, the prosecutor asserted, "Look at what the actions by the defendant are. The defendant runs, that would make some sense if it was just a warrant. Except for there is no testimony given necessarily that he knew that he had a warrant. We don't know what the warrant was for."

Appellant objected to the prosecutor's argument. At the subsequent hearing outside the presence of the jury, defense counsel argued that the prosecutor's comment that there was "no testimony" that appellant knew of the outstanding bench warrant constituted an impermissible comment of appellant's failure to testify because only appellant "could produce testimony as to what [he] would know[.]" The court rejected appellant's argument, stating: "I do not think that that statement compels that the

defendant has to take the stand to establish whether or not he knew that there was a warrant or not.”

DISCUSSION

Appellant’s defense was that someone else, not he, committed the robbery. And as indicated above, the record shows the following: the evidence of appellant’s guilt included police testimony that appellant ran from police (see *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1095 [“flight is one of the factors which is relevant in determining consciousness of guilt”]); in an attempt to rebut this evidence, the defense adduced evidence that a bench warrant for appellant’s arrest was outstanding at the time of appellant’s flight from police, thereby suggesting an explanation for appellant’s flight other than consciousness of guilt of the instant offense; and the prosecutor, to counter any such inference, argued “there is no testimony given necessarily that he knew that he had a warrant.” Appellant contends the prosecutor’s argument would have been understood by the jury as a comment on appellant’s failure to testify, in violation of *Griffin*, because, appellant asserts, “[he] is the only person who could have testified whether he was aware of the warrant.” We disagree.

“*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation.]’ [Citation.]” (*People v. Hovey* (1988) 44 Cal.3d 543, 572; accord, *People v. Medina* (1995) 11 Cal.4th 694, 755.) In determining whether *Griffin* error has occurred, we must determine whether there is a reasonable likelihood that the jury construed the statements as a comment on the defendant’s failure to testify at trial. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

Griffin error of the indirect-comment sort occurs, for example, when “a prosecutor ... argues to the jury that certain testimony or evidence is uncontradicted, if such

contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) But this does not mean that a comment on the absence of testimony is equivalent to a comment on defendant’s failure to testify. Thus, in *Bradford*, no *Griffin* error occurred when the prosecutor argued that the victims had been killed for pleasure and that there was “no evidence to the contrary.” (*Id.* at p. 1338.) As our Supreme Court explained, “The prosecutor did not allude to the lack of refutation or denial by the sole remaining witness, defendant, but rather to the lack of *evidence*, which might have been presented in the form of physical evidence or testimony other than that of defendant.” (*Id.* at p. 1340.)

The comment of the prosecutor, about which appellant complains, did not directly or indirectly refer to appellant’s failure to testify, but was a fair comment on state of the evidence. The prosecutor referred to the absence of any evidence that appellant knew of the warrant. Contrary to appellant’s assertion, evidence of his knowledge could have been presented in ways other than his testimony. If, as appellant sought to establish, he knew of the warrant, he got that information somehow. Somebody might have told him. And evidence that somebody told appellant of the bench warrant would constitute circumstantial evidence of knowledge. (See *People v. Mayo* (1961) 194 Cal.App.2d 527, 535 [“knowledge, like other facts, may be proved by circumstantial evidence”].) Thus, as in *Bradford*, the missing evidence “might have been presented in the form of physical evidence or testimony other than that of defendant.” (*People v. Bradford, supra*, 15 Cal.4th at p. 1340.) There was no *Griffin* error.

Even if the challenged statement violated *Griffin*, we would conclude that the error was harmless. The applicable test for determining whether an error which violates federal constitutional principles is reversible is set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), which held that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a

reasonable doubt.” (*Id.* at p. 24.) “[I]n determining whether prejudicial *Griffin* error has occurred, ‘we must focus upon *the extent to which the comment itself might have increased the jury’s inclination to treat the defendant’s silence as an indication of his guilt.*’ The risk that a comment will have this effect may become considerable if either the court [fn. omitted] or the prosecution [fn. omitted] “solemnizes the silence of the accused into evidence against him” ... by telling the jury “that from the failure of [the defendant] to testify ... the inferences from the facts in evidence [should] be drawn in favor of the State.” ... A forbidden comment, however, is less likely to affect the “substantial rights” of a defendant ... if that comment merely *notes* the defendant’s silence and includes no suggestion that, among the various inferences which might be drawn therefrom, those unfavorable to the defendant are the more probable.” (*People v. Vargas* (1973) 9 Cal.3d 470, 478, quoting *People v. Modesto* (1967) 66 Cal.2d 695, 713.)

If *Griffin* error occurred here, it was similar to the error in *Vargas*. There, a prosecutor argued during rebuttal: “[T]here is no evidence whatsoever to contradict the fact that [a witness] saw [defendants] over [the victim]. *And there is no denial at all that they were there* [robbing the victim]. The defendants are guilty beyond any reasonable doubt” (*People v. Vargas, supra*, 9 Cal.3d at p. 474.) The court concluded that *Griffin* error was committed because the term “‘denial’ connote[d] a personal response by the accused himself” because “only defendant himself could ‘deny’ his presence at the crime scene.” (*Id.* at p. 476.) However, the court further concluded that the error was harmless beyond a reasonable doubt. (*Id.* at pp. 476, 481.) The court noted that the prosecutor’s remark “was brief and mild, and amounted to no more than an indirect comment upon defendant’s failure to testify without suggesting that an inference of guilt should be drawn therefrom.” (*Id.* at p. 479.) The court also observed that “cases which have considered the prejudicial effect of errors similar to those committed in the instant case almost uniformly have found those errors to be harmless.” (*Ibid.*; accord, *People v.*

Monterroso (2004) 34 Cal.4th 743, 770 [““““[i]ndirect, brief and mild references to a defendant’s failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.””””].)

We likewise conclude that the prosecutor’s single remark here was “brief and mild,” and, if it commented on appellant’s failure to testify, it did so indirectly, without suggesting the jurors should draw an inference of guilt therefrom. (*People v. Vargas, supra*, 9 Cal.3d at p. 479; compare *Chapman, supra*, 386 U.S. at p. 19 [*Griffin* error prejudicial where prosecutor “fill[ed] his argument to the jury from beginning to end with numerous references to [defendant’s] silence and inferences of [defendant’s] guilt resulting therefrom” (over 20 references to defendant’s failure to testify)]; *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290 [*Griffin* error prejudicial where prosecutor referred four times to defendant’s failure to testify and “used a demonstrative chart to get this point across”].) In addition, the case against appellant, though not overwhelming, was strong. Finally, we note that the court instructed the jury in accordance with CALCRIM 355 that appellant could rely on the state of the evidence, he had an absolute constitutional right not to testify and jurors “[could] not consider, for any reason at all, the fact that the defendant did not testify.” Jurors are presumed to follow the court’s admonitions and instructions. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.) On this record, *Griffin* error, if any, was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.